Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1053

LEON BLEVINAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

LEON BLEVINAL, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Leon Blevinal respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on December 5, 1979.

OPINIONS BELOW

The panel opinion of the Court of Appeals was reported at --- F.2d ---

(5th Cir. 1979), and has not been published as of this date. The panel decision is reproduced in Appendix A, infra.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

ONE

Were Petitioner's rights guaranteed by the due process clause of the Fifth Amendment and the Sixth Amendment's right to jury trial violated by the trial court's sua sponte Allen-Type instruction informing the jurors that the court had "no intention of giving up" on the case and intended to get a verdict? Did the district court err by its refusal to give a balancing charge requested by trial counsel for Petitioner?

TWO

Must the prosecution prove as an element of a federal firearms act violation the fact that handguns forming the subject matter of the violations were in fact "firearms" within the statutory definition of Title 18, United States Code, § 921(a)(3)? If so, did the Government meet its requisite burden of proof?

THREE

Did the court of appeals, in upholding the verdict on the sufficiency issue depart from the accepted and usual cause of judicial proceedings as to call for an exercise of this Court's supervising power?

STATUTES INVOLVED

TITLE 18, UNITED STATES CODE, § 921(a)(3)

The term "firearm" means (a) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; . .

STATEMENT OF THE CASE

Petitioner Leon Blveninal was indicted on August 28, 1975. The four count indict- charged Petitioner and two codefendants with conspiracy to violate the federal firearms act, engaging in the business of selling firearms without a license, engaging in the business of exporting arms and implements of war, and engaging in the business as a firearms dealer at a location for which a separate licensing fee had not been paid. On October 30, 1978, Petitioner proceeded to trial. A verdict of guilty as to each count was returned by the jury on November 2, 1978. Petitioner was sentenced that same day to a four (4) year period of incarceration.

A panel decision of the Fifth Circuit was rendered on December 5, 1979. Inter alia, the court of appeals held that the district court did not give an impermissible sua sponte verdict-inducing instruction; that the jury was properly able to determine in the

absence of any evidence adduced by respondent that certain weapons were in fact "firearms" under the statutory definition of Title 18, United States Code § 921(a)(3); and that the evidence was sufficient to support a jury verdict of guilty. A strongly worded dissent to the majority opinion was entered by Judge Godbold. The full text of the panel decision is attached as Appendix "A".

REASONS FOR GRANTING THE WRIT

ONE

Due process and the right to trial by jury mandate that the issue of guilt or innocence of a criminally accused be rendered by a jury which has not been improperly coerced into reaching a verdict.

On the third day of Petitioner's trial, the jurors were instructed, excused for lunch, and directed to return to begin deliberations at two o'clock that afternoon. At approximately 5:55 p.m., the jury was returned to the courtroom, and a sua sponte supplemental

instruction was given to the jury:

> Now, members of the Jury, I know you have not yet reached a verdict in this case and as I told you on Monday morning about generally how we operate and so on but of course I didn't go into how we operate if we got into a situation like this where we did not have a verdict late in the day. So, I want to be sure you understand how we intend to operate. We, of course, have spent three days already on this case. We have no intention of giving up on it. I want you to understand that. We have no intention of giving up on it. So, what I intend to do is, it's now about five minutes to six or something like that. If you have not made a verdict by say six forty-five it would be my intention to let you go home and come back in the morning and resume your deliberations in the morning because as I say we don't have any intention of giving up on the case. We intend to get a verdict. So, what I suggest to you, that you do now is go back to the Jury Room and resume your deliberations and if you can reach a verdict by six forty-five that's fine. If you cannot then we will come back in the morning and resume the deliberations after you have had a night's rest.

> I don't want you to feel that you are under any pressure at all to reach a verdict. I just simply wanted you to know how we inted to operate. So, I suggest now that you go back to your Jury Room and resume your deliberations. We will follow that general course.

Trial counsel immediately requested that a balancing instruction be given, informing the jurors that "they shall not surrender convictions honestly held to accommodate an early verdict if ultimately they [were] unable to reach a verdict in some reasonable time a mistrial would be granted." The district court refused the request. The jurors were later returned to court and were directed to return the next morning for deliberations. At approximately eleven o'clock a.m. the next day, without further instruction, the jury returned a verdict of guilt as to all counts.

The sua sponte supplemental instruction impermissibly pressured the jury into rendering a verdict. This Court early re-

cognized and approved the use of supplemental instructions to encourage jury unanimity when it appeared that a jury was facing difficulty in reaching a verdict. Allen v. United States, 164 U.S. 494 (1896). The panel opinion of the Fifth Circuit recognized, however, that Allen-type charges are subject to "close scrutiny, since the potential for jury coercion is present in even the most mild supplemental instructions, considering jury members' zeal to get the job done."

As was correctly noted by Judge Godbold in his dissent:

> The majority analyze the instructions in terms of the Allen charge cases, which are concerned with whether the instruction coerces a minority on the jury from surrendering their views for the purpose of reaching a verdict, and with an evident lack of enthusiasm conclude that what the district judge said here gets by.
>
> This case does not belong in the Allen mold. The instructions that the court intended that there be a verdict in the case, and that the jury was bound to return a verdict, were much more pointedly and directly verdict-inducing than exhortations to jurors that they re-examine their views. The Allen charge is but one narrow and particularized example of a much broader genre of instructions. Here the risk of improper inducement of a verdict is sufficiently high that this defendant is entitled to have his case considered by a jury untainted by arm twisting.

Sanctity of jury deliberations "cannot be sullied by a trial judge's extra Allen nudge." United States v. Amaya, 509 F. 2d 8, 13 (5th Cir. 1975).

The supplemental instruction presented an incomplete, one-sided comment on the course the deliberations were to take and more importantly, the intention of the district court, and not the jury, to not give up on the case.

The decision of the panel on the issue of whether the supplemental instruction and refusal to further instruct the jury is a precedent setting error of exceptional public importance. To allow the decision to stand

jeopardizes the ability of a criminal defendant to obtain a verdict untainted by judicial juror coercion.

TWO

Petitioner was convicted of various substantive charges involving the transportation and sale of firearms. Respondent was constitutionally required to prove every element of its case beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Title 18, United States Code § 921(a)(3) statutorily defines a "firearm" as a weapon which will or is designed to or may readily be converted to expel a projectile by means of an explosive. The record of Petitioner's trial is void of any testimony, either expert or lay, that the handguns introduced into evidence fit into this statutory definition. Unlike other appellate decisions where the issue of proof of firearms has been raised, no evidence except the guns themselves were presented to this jury. See, e.g.,

United States v. Melancon, 462 F.2d 82 (5th Cir. 1972) [prosecution under Title 26, U.S. C.]; United States v. 16, 179 Molso Italian .22 Caliber Guns, 443 F.2d 463 (2nd Cir. 1971); United States v. Williams, 427 F.2d 1031 (9th Cir. 1970); United States v. Barno, 340 F.Supp. 1326 (D.C. D.C. 1972); United States v. Catanzaro, 368 F.Supp. 450 (D.C. Conn. 1973); United States v. Cubeta, 369 F.Supp. 242 (D.C. Conn. 1974).

The panel concluded:

> The jury in the present case was allowed to examine .38 calibre revolvers and .380 calibre automatic handguns described in the indictment. The jury was thus able to determine their completeness and could properly conclude, without the help of expert testimony, that the weapons were indeed "firearms" under the statutory definition.

Such a boot-strapping procedure permits and authorizes a constitutionally impermissible procedure. Unlike the general rule-type cases involving juror experimentation where

jurors merely take a closer look at previously introduced evidence [e.g., United States v. Beach, 296 F.2d 153 (4th Cir. 1961); United States v. Hawkins, 595 F.2d 751 (D.C. Cir. 1978)], the jury in the instant case could not conclude the guns were firearms by their collective or singular examinations. Respondent failed to affirmatively prove that the substantive offenses involved "firearms", and Petitioner's convictions on those counts cannot stand.

THREE

The court of appeals, in upholding the verdict on the sufficiency issue departed from the accepted and usual cause of juricial proceedings as to call for an exercise of this Court's supervisory power.

Petitioner took the stand in his own behalf and explained to the jury without contradiction how he entered into a legitimate gun business with his co-defendants. Briefly summarized, Petitioner, a naturalized

American citizen living in Montreal, Canada was to serve as financier for co-defendants Pat and Ted Harrell, who were to engage in the day by day operations of the Valdosta, Georgia gun business. All financial arrangements and business correspondence entered into by Petitioner and his co-defendants were conducted in their own names: aliases or false information were not utilized. During its case-in-cheif and rebuttal, Respondent did not exclude the hypothesis that Petitioner engaged in a legitimate business, and had no knowledge nor participation in any wrong doing on the part of his co-defendants.[1]

In denying Petitioner's contention that the trial erred in failing to grant his

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[1] In presentatnion of the facts in its written opinion, the panel stated, "Defendant was subsequently found in possession of 25 pistols." This recitation is in error: the record clearly bears out that Petitioner was never "found" in possession of any of the subject handguns.

motion for judgment of acquittal, the panel paraphrased the oft-cited decision of Glasser v. United States, 315 U.S. 60 (1942).

Justice Murphy, in delivering the Glasser opinion, however, went beyond the "light most favorable to the government" standard. A key phrase is found in the original text:

> The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.

Glasser, supra, at 80.

Although the evidence must be viewed in the light most favorable to the government, "complete judicial abdication to the trier of fact is not required". United States v. Peterson, 488 F.2d 645, 649 (5th Cir. 1974). See also, Washington v. United States, 357 U.S. 348 (1958). At some point, the judicial conscience must recognize that on the basis of the evidence adduced, the jury must necessarily have had a reasonable doubt

as to the inconsistency and incredibility of the evidence to exclude every reasonable hypothesis but that of guilt. Due process, as guaranteed by the Fifth Amendment to the United States Constitution, demands nothing less.

The decision of the panel on the issue of sufficiency of the evidence is a precedent setting error of exceptional public importance. To allow the decision to stand by necessity jeopardizes the ability of a criminal defendant to obtain a constitutionally permissible trial.

CONCLUSION

For the foregoing reasons, Petitioner prays that his petition for a writ of certiorari be granted.

This the fourth day of January, 1980.

Respectfully submitted,

Frank J. Petrella

CERTIFICATE OF SERVICE

I hereby certify that on this fourth day of January, 1980, three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEON BLEVINAL,
Defendant-Appellant.

No. 78-5712.

United States Court of Appeals,

Fifth Circuit.

Dec. 5, 1979.

* * *

Appeal from the United States District Court for the Middle District of Georgia.

Before GODBOLD, RONEY and FRANK M. JOHNSON, JR., Circuit Judges.

RONEY, Circuit Judge:

Defendant appeals his conviction on four firearms charges, arguing *first*, the district court gave what he regards as an impermissible *Allen*-type charge; *second*, the court erred in admitting three weapons into evidence; *third*, there was insufficient evidence to support the convictions; and *fourth*, there was no evidence upon which the jury could conclude that the weapons relating to the indictment met the statutory definition of "firearm." Finding no error, we affirm.

Defendant and two others formulated a plan to purchase firearms for resale. Two lots of handguns were successfully bought and resold, but while negotiating for the sale of a third lot, defendants suspected that federal

agents were investigating their activities. In order to ascertain whether they were in fact under surveillance, defendant and the others conducted a dummy delivery run. Their suspicions were borne out. Federal agents stopped the motor home in which defendant and his accomplices were riding, in order to search it for guns. Instead of illegal firearms, agents recovered only owner's manuals for Colt AR–15 rifles and High-Standard shotguns from defendant's suitcase. Defendant and the others were released.

Defendant was subsequently found in possession of 25 pistols. Along with the handguns, agents recovered an AR–15 rifle and two High-Standard shotguns, the kind depicted in the owner's manuals previously seized from defendant.

Defendant was convicted under a four-count indictment charging conspiracy to violate the federal firearms acts, 18 U.S.C.A. §§ 371, 922(a)(1), 922(b)(3), 922(b)(5), 922(m), 923(a), 924, engaging in the business of selling firearms without a license, 18 U.S.C.A. §§ 923, 924, exporting arms without proper registration, 22 U.S.C.A. § 1934, and engaging in business as a firearms dealer without having paid a licensing fee, 18 U.S.C.A. §§ 923(a), 924. The charges all related to handguns. No charges were brought in connection with the rifle and shotguns seized from defendant.

So-Called Allen charge

[1] When the jury was initially convened, the trial court informed the members that they would sit each day "to about a quarter after five or five thirty, something like that." On the third day of trial the jury was charged, and at approximately 2:00 p. m., deliberations

began. At approximately 5:55 p. m., no verdict having been returned, but without any indication that the jury was experiencing difficulties, the court returned the jury to the courtroom. Following is the statement the court then made to the jury, with the words about which defendant complains on appeal in italics.

> THE COURT: Now, members of the Jury, I know you have not yet reached a verdict in this case and as I told you on Monday morning about generally how we operate and so on but of course I didn't go into how we operate if we got into a situation like this where we did not have a verdict late in the day. So, I want to be sure you understand how we intend to operate. We, of course, have spent three days already on this case. *We have no intention of giving up on it. I want you to understand that. We have no intention of giving up on it.* So, what I intend to do is, it's now about five minutes to six or something like that. If you have not made a verdict by say six forty-five it would be my intention to let you go home and come back in the morning and resume your deliverations in the morning because *as I say we don't have any intention of giving up on the case. We intend to get a verdict.* So, what I suggest to you, that you do now is you go back to the Jury room and resume your deliverations and if you can reach a verdict by six forty-five that's fine. If you cannot then we will come back in the morning and resume the deliverations after you have had a night's rest.
>
> I don't want you to feel that you are under any pressure at all to reach a verdict. I just simply wanted you to know how we intended to operate. So, I suggest now that you go back to your Jury Room and resume your deliverations. We will follow that general course.
>
> All right.

After retiring again, defendant's counsel objected to the court's instruction, "We have no intention of giving up on it," because it carried with it "a connotation that the Court means forever and ever." The court refused counsel's suggestion that the jury be further instructed that a mistrial would be granted if the jury members could not agree on a verdict without surrendering honestly held beliefs.

Without rendition of a verdict, the jury recessed about 45 minutes later. The next morning, after one and one-half hours of deliverations and without any additional instructions, a verdict of guilty on all four counts was returned.

[2] The "*Allen* charge," *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), is a supplemental instruction designed to encourage jury unanimity, generally given when it appears that the jury may be having difficulty reaching a verdict. The Supreme Court has approved such supplemental instructions, as has this Court, sitting *en banc*. *United States v. Bailey*, 480 F.2d 518 (5th Cir. 1973). Considered in its entirety, so long as the charge does not unduly coerce the minority into surrendering its views for the purpose of rendering a verdict, or set a time limt for the deliverations, the charge may be approved. *United States v. Cheramie*, 520 F.2d 325, 329, 330 (5th Cir. 1975). Nonetheless, where given, the charge is subject to close scrutiny, since the potential for coercion is present in even the most mild supplemental instructions, considering jury members' zeal to get the job done.

[3] Defendant argues first that the district court should not have returned the jury for supplemental instructions on its own motion, but should have waited for a suggestion from the jury itself, or from counsel, that the jury was experiencing difficulties. In the first place this Court has not required such a procedure. *See United States v. Scruggs*, 583 F.2d 238, 241 (5th Cir. 1978). In the second place, there was no indication that the jury was having difficulty. It had not been out an inordinate length of time. In the third place, we do not interpret the court's actions as concern for whether the jurors were having difficulty seeking a verdict, but rather as concern for the fact that the jury members were entitled to some guidance since they had not finished their work at the usual adjournment time. The court had initially told the jury that it would sit each day until five or five-thirty, and the jury was entitled to know by 5:55 p. m. what procedure would be followed as it continued its work. It does not appear that the court intended to do any more.

The coercion about which defendant complains is the district court's suggestions, "We have no intention of giving up on it." In considering whether any statement unduly coerced a jury into rendering a verdict, the court looks "to the language employed and that language's impact, under the circumstances, on the finders of facts." *United States v. Cheramie*, 520 F.2d at 329 n.3. If the "charge may be plausibly read as more coercive than the standard charge we must hold that the charge was incorrectly given." *United States v. Amaya*, 509 F.2d 8, 13 (5th Cir. 1975), *cert. denied sub nom. Flores-Amaya v. United States*, 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed.2d 551 (1977).

Defendant argues that by suggesting the court was unwilling to "give up" the case, the court negated the convention that a jury member has a duty not to surrender an honest belief of guilt or innocence, for the more pur-

pose of rendering a verdict. We interpret the language to communicate nothing more than the the jury could have as long as it needed to reach a verdict, and would not be cut short because of the lateness of the hour. Examination of the supplemental charge in its entirety reveals, however, that the trial judge did tell the jury, "I don't want you to feel that you are under any pressure at all to reach a verdict." Regardless of what the trial judge may have meant by the statement, "We have no intention of giving up on it," he ameliorated whatever effect that statement may have had on the jury by relieving any pressure to reach a verdict that day.

The trial judge need not announce in so many words that a hung jury is a viable alternative, nor is it usual to do so in the ordinary course of a trial. Without some indication from the jury that there was disagreement, the court does not usually address that problem. The *Allen*-charge addresses the problem. The court's instructions did not give any indication that it thought there was disagreement, nor did they advise the jurors what to do in such event.

There are many times during the course of standard charges when language taken out of context could be construed as an instruction to reach a verdict. At no time during standard instructions is a jury instructed that it has an alternative to reaching a verdict. The verdict form given the jury does not contain a place for indicating such a result. It was unnecessary that the judge do so here, because he gave no indication that anyone should compromise his position. For all he knew at that time, not a single juror had yet arrived at a decision. Considering the totality of circumstances and the language used, the charge did not unduly coerce the jury.

United States v. Fossler, 597 F.2d 478, 485 (5th Cir. 1979).

The following three points on appeal need no extended discussion.

Relevance of Manuals and Guns

[4] Over objection, the Government introduced into eivdence both owner's manuals and the rifle and two shotguns found in defendant's possession. Defendant explained that he had planned to show the manuals to some friends in Canada, where the guns they depicted were unavailable. The Government agreed, and the jury was instructed, that possession of the manuals, or the rifle and shotgun themselves, was not illegal.

[5] Defendant, describing the weapons as "personal," argues the evidence should have been excluded since under Fed.R.Evid. 403, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Absent an abuse of discretion by the trial court, evidentiary rulings of this sort will not be disturbed on appeal. *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979). The defendant has not convinced us that such abuse of discretion occurred here.

Sufficiency of Evidence

[6] Direct evidence from a co-conspirator was used by the Government, and was corroborated by additional evidence. The jury was properly instructed on assessment of the co-conspirator's testimony. Considering the evidence in a light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), it was sufficient to support a jury verdict of guilt.

Were Handguns Firearms?

[7] Finally, defendant argues that no evidence was introduced to show the handguns, which were the subject of the indictment, fit the statutory definition of firearm.

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; . . .

18 U.S.C.A. § 921(a)(3). The various substantive charges all involved the improper transportation and sale of firearms. The jury was correctly charged that the Government bore the duty of proving each element of its case beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The jury in the present case was allowed to examine .38 calibre revolvers and .380 calibre automatic handguns described in the indictment. The jury was thus able to determine their completeness and could properly conclude, without the help of expert testimony, that the weapons were indeed "firearms" under the statutory definition.

AFFIRMED.

GODBOLD, Circuit Judge, dissenting:

I would reverse because of the verdict-inducing instructions to the jury.

The majority analyze the instructions in terms of the *Allen* charge cases, which are concerned with whether the instruction coerces a minority on the jury from surrendering their views for the purpose of reaching a verdict, and with an evident lack of enthusiasm conclude that what the district judge said here gets by.

This case does not belong in the *Allen* mold. The instructions that the court intended that there be a verdict

in the case, and that the jury was bound to return a verdict, were much more pointedly and directly verdict-inducing than exhortations to jurors that they re-examine their views. The *Allen* charge is but one narrow and particularized example of a much broader genre of instructions. Here the risk of improper inducement of a verdict is sufficiently high that this defendant is entitled to have his case considered by a jury untained by arm twisting.

The majority consider the remarks about not giving up on the case. They do not even comment upon what is to me the most objectionable language: "We intend to get a verdict."

Interpreting the "not giving up" language as communicating nothing more than that the jury could have as long as it needed to reach a verdict and would not be cut short because of the lateness of the hour, is a possible construction although it seems to me a strained one. But certainly it is not a necessary construction. The majority suggest also that the "not giving up" language was ameliorated by a supplemental charge that "reliev[ed] any pressure to reach a verdict that day." The verdict-inducing remarks were not limited to that day. So far as we know, the jurors, when they resumed deliberations the next morning, still considered as binding upon them the statement of the court that it intended that there be a verdict in the case.

Defense counsel is not an unbiased observer but he can, and did, listen and react. It is not without significance that he rose up at once and asked for a supplemental instruction covering the right of jury members to not agree on a verdict. In short, what the majority find did not have impact on the mind of the jurors had immediate

impact on the mind of defense counsel. The supplemental instruction should have been given. It was not. The conviction should be reversed.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 607 F. 2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1979. The petition for a writ of certiorari was filed on January 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court coerced a verdict by its instructions.

2. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371, and three substantive firearms offenses. The firearms offenses were (1) dealing in firearms without a license, in violation of 18 U.S.C. 923 and 924; (2) engaging in business as a firearms dealer in places for which a separate licensing fee had not been paid, in violation of 18 U.S.C. 923(a) and 924; and (3) exporting arms and implements of war without registering, in violation of 22 U.S.C. (1970 ed.) 1934. He received concurrent sentences of four years' imprisonment for the conspiracy and the first two substantive offenses, and a concurrent two-year sentence for unlawfully exporting arms and implements of war. The court of appeals affirmed with one judge dissenting (Pet. App.).

1. The evidence showed that petitioner, an American citizen residing in Canada, entered into a firearms distribution scheme with co-defendants Patrick Harrell and Theodore Harrell, residents of Georgia.[1] The group intended to purchase firearms in Georgia and Florida and transport them for resale into Canada. Pursuant to the scheme, three lots of handguns were purchased. The first lot was purchased by Patrick Harrell with money that petitioner wired to him from Canada (I Tr. 58-60, 153); Harrell executed an ATF Firearms Transaction Record (Form 4473) indicating that he was the ultimate purchaser of the weapons (I Tr. 60; D.X. G-1-A). A week after the purchase, petitioner and a companion came to Georgia, where the weapons were packed into suitcases, loaded into the trunk of petitioner's automobile, and then

[1]The Harrells both pleaded guilty to the conspiracy count, and Patrick Harrell testified as a government witness.

transported back to Canada (I Tr. 62-64, 134-135). At the time of this transaction, neither petitioner nor Patrick Harrell was licensed as a dealer in firearms, and at no time were they or Theodore Harrell licensed to export firearms to Canada (II Tr. 53-54).

The second lot of firearms was purchased through Theodore Harrell, who had at that point obtained a firearms dealer's license. On the basis of the license, an account was opened with a gun supply company in Miami, Florida (I Tr. 65-66). Firearms were ordered from the gun supply company in accordance with specifications received from petitioner (I Tr. 67). Patrick Harrell put up a $1000 deposit when the account was opened, using money petitioner had given him from the proceeds of the sale of the first lot of firearms (I Tr. 66). Petitioner wired Patrick the money to be used to pay the balance when the order was received from the Miami company (I Tr. 68). When the firearms were received, Patrick executed ATF Form 4473, indicating that he was the ultimate purchaser of the weapons from Theodore (I Tr. 116). Petitioner was visiting Patrick at the time (I Tr. 70); subsequently, under petitioner's direction, petitioner and Patrick took the weapons to Jacksonville, Florida, where they boxed them and placed them in a motor home driven by an unidentified individual (I Tr. 70-74). Some of the weapons from this order, as well as some from the first order, were subsequently recovered by law enforcement officials in Canada (II Tr. 21-30, 45-52).

The third lot of firearms was also ordered from the Miami company (I Tr. 81-82). Except for certain weapons that the Harrells intended to keep for themselves, this lot was purchased for resale in Canada by petitioner (I Tr. 85-86). The weapons were eventually seized by government agents (I Tr. 256-257).

2. At the beginning of trial, the court informed the jurors that they could expect to stay in session until approximately 5:15 or 5:30 p.m. each day and that the trial should last three days (I Tr. 37-38). The jury began its deliberations after lunch on the third day. When no verdict had been reached shortly before 6:00 p.m., the court called the jurors to the courtroom and instructed them as follows (II Tr. 236-237):

> Now, members of the Jury, I know you have not yet reached a verdict in this case and as I told you on Monday morning about generally how we operate and so on but of course I didn't go into how we operate if we got into a situation like this where we did not have a verdict late in the day. So, I want to be sure you understand how we intend to operate. We, of course, have spent three days already on this case. We have no intention of giving up on it. I want you to understand that. We have no intention of giving up on it. So, what I intend to do is, it's now about five minutes to six or something like that. If you have not made a verdict by say six forty-five it would be my intention to let you go home and come back in the morning and resume your deliberations in the morning because as I say we don't have any intention of giving up on the case. We intend to get a verdict. So, what I suggest to you, that you do now is you go back to the Jury Room and resume your deliberations and if you can reach a verdict by six forty-five that's fine. If you cannot then we will come back in the morning and resume the deliberations after you have had a night's rest.
>
> I don't want you to feel that you are under any pressure at all to reach a verdict. I just simply wanted you to know how we intended to operate. So, I suggest now that you go back to your Jury Room and resume your deliberations. We will follow that general course.

Petitioner, objecting that the phrase "We do not intend to give up" could carry a connotation of "forever and ever," asked the court to instruct the jurors not to surrender convictions honestly held and to inform them that a mistrial was an option if they could not reach a verdict in a reasonable time. The court, stating that it had neither suggested that "anybody give up any conviction of any kind" nor implied that the case would never be given up, declined to suggest the possibility of a mistrial or give any other further instruction (II Tr. 237-238). The jury deliberated for another forty-five minutes and was then excused for the night. After one and one-half hours of deliberation the next morning, the jury returned a verdict of guilty on all counts (Pet. App. 4a).

3. The court of appeals found no indication that the jury was having difficulty reaching a verdict at the time that the court's remarks were made, and it interpreted those remarks as an attempt to give the jury guidance as to adjournment time rather than as a reflection of concern that the jury might not be able to reach a verdict. It interpreted the language concerning not giving up as nothing more than an effort to inform the jurors that they could have as long as they needed to reach a verdict, and it found that any coerciveness in the language was ameliorated by the trial court's further statement that "I don't want you to feel that you are under any pressure at all to reach a verdict." Considering "the totality of circumstances and the language used," the court of appeals concluded, with one judge dissenting, that the trial court's words did not coerce the jury (Pet. App. 5a-6a).

ARGUMENT

1. The decision of the court of appeals on the jury coercion question, representing its assessment of the effect of the particular language used in "the totality of circumstances," is a fact-bound determination that does not warrant review by this Court. Even more clearly, it does not, as petitioner suggests (Pet. 7-8), afford an occasion for determining acceptable limits for "*Allen*-type charges." The statements in question were not made in response to any suggestion of jury impasse and did not focus upon jurors holding minority views. Thus, as the dissent acknowledged (Pet. App. 8a), the case "does not fit the *Allen* mold."[2]

In any event, the holding of the court of appeals on the coercion issue was correct. Even assuming that the particular language complained of by petitioner might have tended to persuade the jurors that they were obligated to reach a verdict, such an impression would have been dispelled by the trial court's direct statement that they were *not* to feel "under any pressure at all to reach a verdict." And, at no time during its deliberations did the jury indicate that it was experiencing difficulty in reaching agreement.

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[2]Moreover, even cases that do fit that mold have not been deemed deserving of review by this Court. See, *e.g.*, *United States* v. *Giacalone*, 588 F. 2d 1158, 1166-1167 (6th Cir. 1978), cert. denied, 441 U.S. 944 (1979); *United States* v. *Weiner*, 578 F. 2d 757, 764-765 (9th Cir.), cert. denied, 439 U.S. 981 (1978); *United States* v. *Carter*, 566 F. 2d 1265 (5th Cir.), cert. denied, 436 U.S. 956 (1978); *United States* v. *Dyba*, 554 F. 2d 417 (10th Cir.), cert. denied, 434 U.S. 830 (1977); *United States* v. *Lee*, 509 F. 2d 645 (2d Cir.), cert. denied, 422 U.S. 1044 (1975). Thus the circuits have been permitted to adopt varying versions of the *Allen* charge rather than being required to adhere to a single particular text.

2. Petitioner makes two contentions regarding the sufficiency of the evidence. First, he argues (Pet. 10) that the government offered no testimony to prove that the handguns offered into evidence fit the definition of "firearm" set forth in 18 U.S.C. 921(a)(3). This contention is without merit. The statutory definition provides, in pertinent part, that a firearm is "any weapon * * * which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." As the court of appeals noted (Pet. App. 8a), the jurors were permitted to examine particular handguns described in the indictment.[3] In addition, invoices describing the weapons were admitted into evidence (see 1 Tr. 157, 177), and ATF forms were executed as to all of the weapons. Such evidence provides a sufficient basis for the jury's conclusion that petitioner trafficked in "firearms" within the statutory definition. See *United States* v. *Liles*, 432 F. 2d 18, 19-20 (9th Cir. 1970).

Second, petitioner asserts (Pet. 12-13) that he testified "without contradiction" that he entered into a "legitimate" gun business with his co-defendants, in which he served merely as the financier. On the basis of this he contends that the hypothesis was not excluded that he personally had "engaged in a legitimate business" without "knowledge or participation in any wrong doing on the part of his co-defendants" (Pet. 13). The short answer to this contention is that an individual who participates in the business of selling firearms has an absolute duty to

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[3]Petitioner's conviction rested both on the handguns introduced into evidence (those from the third lot seized by government agents and those recovered by Canadian law enforcement officials from the first and second lots) and on unrecovered weapons in the first and second lots described in documentary evidence.

make certain that the business is properly licensed. *United States* v. *Freed*, 401 U.S. 601, 609-610 (1971). Petitioner was not privileged to obtain the financial benefits of exporting firearms to Canada for resale, while relying on others to obtain the licenses necessary to legitimate the transactions. Moreover, petitioner's claim that he acted solely as a financier is belied by Patrick Harrell's testimony concerning petitioner's active participation in the transshipment of the weapons. Petitioner disputed Harrell's testimony in this regard, but the jury was not required to believe him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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